

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PRECIOUS GACHELIN)	
Claimant)	
V.)	
)	
ALPHA HOUSE INC.)	AP-00-0457-315
Respondent)	CS-00-0449-639
AND)	
)	
ACCIDENT FUND INSURANCE)	
COMPANY OF AMERICA)	
Insurance Carrier)	

ORDER

The claimant, through Randy Stalcup, requested review of Administrative Law Judge (ALJ) Ali Marchant’s Award dated March 31, 2021. Dallas Rakestraw appeared for the respondent and its insurance carrier (respondent). After considering the parties’ briefs, the Board heard oral argument on July 15, 2021.

RECORD AND STIPULATIONS

The Board considered the record as detailed in the ALJ’s Award and adopted all stipulations listed therein.

ISSUES

1. What is the nature and extent of the claimant’s disability?
2. Is the claimant entitled to future medical treatment?

FINDINGS OF FACT

The claimant worked for the respondent taking care of patients. On February 11, 2020, she fell off a curb while assisting patients to a dance, injuring her left foot and incurring a pseudo-Jones fracture. The claimant received authorized medical treatment by Dr. Morgan through July 17, 2020. The claimant did not receive any additional medical treatment thereafter. Nevertheless, she has left foot pain most days, which is aggravated by walking.

At her attorney's request, the claimant saw Daniel Zimmerman, M.D., on August 26, 2020. The claimant's chief complaint was left distal foot pain and discomfort. Dr. Zimmerman noted hyperesthesia on the lateral side of the claimant's left foot from approximately the malleolus to the tip of the fifth toe. During the physical examination, the claimant exhibited weakness in toes two through five of the left foot, range of motion restrictions at the ankle, and discomfort to palpation over the anteromedial tendon insertions at the left ankle. Dr. Zimmerman stated the claimant's left ankle tested positive for tarsal tunnel syndrome. The doctor diagnosed the claimant with left fifth metatarsal fracture and chronic anteromedial tendonitis affecting the left ankle. He opined the prevailing factor for these diagnoses was the work accident of February 11, 2020.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*), Dr. Zimmerman gave the claimant a 14% impairment to the left lower extremity, consisting of 7% for chronic tendonitis affecting her left ankle (which the doctor called a chronic ankle sprain or strain) and 7% for the fracture of her left fifth metatarsal due to the accidental injury. In addressing future medical, Dr. Zimmerman testified the claimant could use non-steroidal anti-inflammatory medication, such as Celebrex or Mobic, and perhaps a steroid injection for chronic metatarsalgia and findings consistent with tarsal tunnel syndrome.

At the respondent's request, the claimant saw Chris Fevurly, M.D., on November 11, 2020. The claimant reported constant popping of her left foot and frequent pain in her lateral foot. The claimant ambulated at a normal pace with almost no limp. She performed a toe and heel walk and a full squat. There were no exaggerated pain behaviors. The claimant was tender over the area where the pseudo-Jones fracture occurred. There was no foot grinding, popping, crepitation, laxity or deformity. Dr. Fevurly found full range of motion in the claimant's ankle and foot, including her toes. The claimant had no toe weakness. Dr. Fevurly diagnosed the claimant with a pseudo-Jones fracture of the left foot due to the accidental injury. Further, Dr. Fevurly opined there was no evidence of the claimant having a chronic ankle injury, including tendinosis, and there was no evidence of any neurological injury involving the peripheral nerves of the claimant's left foot.

Dr. Fevurly assigned the claimant no impairment under the *Guides* because there was no loss of range of motion of the claimant's left ankle and no loss of range of motion or strength involving the claimant's left foot or toes. Further, he provided no rating because there were no objective findings and an x-ray showed the claimant's fracture healed without deformity. The doctor provided no permanent restrictions and opined the claimant will not require future medical treatment. The doctor's report stated the claimant's left foot pain should continue to improve and "totally resolve with a tincture of time."¹ Likewise, Dr. Fevurly testified, "I think that she's going to still have some symptoms probably for a year or so as this bone matures. But as time passes here and the bone matures, I think she'll have resolution of her lateral foot discomfort."²

¹ Fevurly Depo., Ex. 2 at 6.

² Fevurly Depo. at 13.

One week after being evaluated by Dr. Fevurly, during a deposition on November 18, 2020, the claimant was asked about the extent of her injury:

Q. I want to just go back and clarify a couple things that you discussed with Mr. Stalcup. You indicated to Mr. Stalcup that you are having pain basically in the third, fourth and fifth toe or metatarsal, is that right?

A. Yes.

Q. Is that correct, ma'am?

A. I'm sorry, can you repeat that?

Q. Sure. The pain that you are having is limited to the three, four and five toes or the metatarsals that are right behind those toes, is that correct?

A. Yes.

Q. You are not having pain or discomfort in your left heel, is that correct?

A. In my heel, no.

Q. You are also not having pain in your ankle, is that correct?

A. Yes.

Q. You are also not having pain in what I would call your lower leg, basically that area between your knee and your ankle, is that correct?

A. Yes.

Q. Let's just go ahead and do the whole leg, you are not having pain between your hip and your knee as a result of your workplace injury, is that correct?

A. Yes.

Q. Stated specifically, the pain that you are experiencing as a result of your workplace injury is limited to your third, fourth and fifth toe and the metatarsals right behind it, is that correct?

A. Yes.³

³ Claimant Depo. at 10-12.

ALJ Marchant ruled:

The Court does not find Dr. Zimmerman's opinions with regard to Claimant's left ankle impairment to be supported by the evidence, including Claimant's own testimony. Claimant specifically denied symptoms in her left ankle during her testimony and only described symptoms below her ankle and into her foot. After disregarding Dr. Zimmerman's opinion regarding Claimant sustaining 7% impairment related to chronic ankle tendinitis, the Court finds Dr. Zimmerman's remaining opinions with regard to Claimant's impairment related to her left metatarsal fracture to be in compliance with the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, and supported by the evidence. The Court further finds Dr. Fevurly's opinions to be in compliance with the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, and supported by the evidence.

The Court accords equal weight to Dr. Zimmerman's opinion of 7% impairment for residuals of Claimant's metatarsal fracture and Dr. Fevurly's opinion of 0% impairment for Claimant's metatarsal fracture. As a result, the Court finds that Claimant sustained a 3.5% permanent partial functional impairment to the left foot as a result of her February 11, 2020, work-related injuries.

...

Dr. Zimmerman opined that Claimant would more likely than not require future medical treatment as a result of her injuries, including prescription anti-inflammatory medications and injections. Dr. Zimmerman specifically related those future treatment needs to Claimant's ongoing metatarsalgia from her fracture. Dr. Fevurly opined that Claimant would not likely require future medical treatment as a result of her injuries. Given Claimant's ongoing pain complaints in her left foot related to her injuries as well as Dr. Zimmerman's testimony, the Court finds that Claimant has met her burden to prove that it is more probable than not that she will require future medical treatment related to her injuries. Future medical will be considered upon proper application.⁴

The claimant argues she sustained a 14% impairment to the left lower extremity. The claimant asserts her medical expert, Dr. Zimmerman, is more credible and she is entitled to impairment for her metatarsal fracture and chronic tendonitis affecting the left ankle, as well as future medical treatment. The respondent argues their medical expert, Dr. Fevurly, is more credible and the claimant has no impairment, emphasizing she denied ankle symptoms and stated her symptoms were limited to her left foot only. The respondent also contends the claimant is not entitled to future medical treatment based on the lack of additional treatment to date and Dr. Fevurly's opinion.

⁴ Award at 8-9.

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.⁵ A claimant must prove his or her right to an award based on the whole record under a “more probably true than not true” standard.⁶

1. The claimant sustained a 3.5% impairment to her left foot on account of her work-related accidental injury.

K.S.A. 44-510d(b) states, in part:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...

(14) For the loss of a foot, 125 weeks.

(15) For the loss of a lower leg, 190 weeks.

...

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The location of the impairment, not the situs of injury, controls the award of permanent partial disability benefits.⁷ K.A.R. 51-7-8(c)(4) states, “Each injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.”

⁵ See K.S.A. 44-501b(b).

⁶ See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

⁷ See *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984); see also *Bryant v. Excel Corp.*, 239 Kan. 688, 692, 722 P.2d 579 (1986).

Regarding the nature and extent of the claimant's disability, the question is whether she has left ankle impairment, which would be an injury to her left lower leg. The claimant's main complaint to Dr. Zimmerman was distal left foot pain. While Dr. Zimmerman conducted testing showing the claimant had left ankle symptoms in the form of tarsal tunnel syndrome, there are two facts detracting from this finding. First, while the claimant may have had signs of tarsal tunnel syndrome when seen by Dr. Zimmerman, Dr. Fevurly's subsequent examination a couple months later revealed nothing apart from left foot pain. Second, the claimant testified one week after Dr. Fevurly's examination that she did not have any left ankle symptoms, and confirmed she only had left foot pain. The Board has no reason to dispute the claimant's assessment of her symptoms.

The Board concludes the claimant sustained permanent impairment to her left foot only. The Board sees no reason to diverge from ALJ Marchant's finding, under the *Guides*, that the claimant sustained a split of the impairment ratings from the two expert medical witnesses concerning the claimant's foot impairment. Therefore, the Board adopts ALJ Marchant's conclusion the claimant sustained a 3.5% permanent impairment of function to her left foot on account of her work-related accidental injury.

2. The claimant proved her right to pursue future medical treatment.

K.S.A. 44-510h(e) states:

It is presumed that the employer's obligation to provide [medical treatment] shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

The Board agrees with ALJ Marchant granting the claimant the right to pursue future medical treatment. Dr. Zimmerman recommended future medical treatment for the claimant's fracture. The claimant had residual symptoms when seen by Dr. Fevurly. While Dr. Fevurly opined the claimant will continue to improve and all of her symptoms will dissipate, such conclusion is partly based on speculation. The Board finds the claimant met her burden of proof on this issue and is entitled to pursue future medical treatment on account of her work-related accidental injury, as provided in K.S.A. 44-510k.

AWARD

WHEREFORE, the Board affirms ALJ Marchant's March 31, 2021, Award.

IT IS SO ORDERED.

Dated this _____ day of July, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Randy Stalcup
Dallas Rakestraw
Hon. Ali Marchant